No. 12308

In the United States Court of Appeals for the Ninth Circuit

EDDY D. FIELD AND HELEN FIELD, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 27–37) is not reported.

JURISDICTION

This petition for review (R. 147–149) involves federal income and victory taxes for the year 1943. The year 1942 is also involved because of Section 6 (the forgiveness features) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

On February 25, 1947, the Commissioner of Internal Revenue mailed to the taxpayers, husband and wife, notices of deficiencies in the amounts of $7,913.65 and $8,083.13, respectively. (R. 10–14, 20–25.) Within ninety days thereafter and on April 29, 1947, the taxpayers filed petitions in the Tax Court for redeter-

mination of tax deficiencies, under the provisions of Section 272 of the Internal Revenue Code. (R. 7–14, 16–25.) The proceedings were consolidated for hearing before the Tax Court. (R. 2, 5, 27.) The decisions of the Tax Court determining the deficiencies were entered May 4, 1949. (R. 37–38.) This case is brought to this Court by a petition for review filed July 1, 1949 (R. 147–149), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the court erred in affirming the Commissioner's determination that profits realized by taxpayers during 1943 from sales of real estate represented ordinary business income, not capital gains under Section 117 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These may be found in the Appendix, *infra.*

STATEMENT

The facts as found by the Tax Court (R. 28–32, 34–35) may be summarized as follows:

Taxpayers are husband and wife, residents of California, and filed separate income tax returns on a community basis for the taxable years involved. (R. 28.) Since the income in question was community income, the issue is the same for each taxpayer.[1]

In 1927 the taxpayer husband obtained a real estate brokerage license and since that time has been en-

[1] The proceedings were consolidated for hearing below (R. 27), and a single petition for review was filed (R. 147).

gaged in business as a real estate and insurance broker in Los Angeles, California. During the taxable year 1943 he maintained three offices in that city and employed a number of real estate salesmen. During the years 1942 and 1943, his organization handled the sale of over 300 properties, for which he received total commissions of $52,039.07 in 1942 and $72,177.83 in 1943. (R. 28–29.)

In 1934 taxpayers organized a real estate corporation known as Oxford Associates, paying in $2,000 in exchange for all of the stock which they thereafter held equally. Between 1934 and 1941, this corporation acquired various real estate properties in Los Angeles. Some of these it sold during this period, but most were held as income producing properties. At the end of 1941, the corporation was dissolved and its 19 properties were distributed in liquidation to taxpayers as its sole stockholders. Of these, eleven were improved income producing properties and eight were unimproved lots. In 1942, two of the improved properties were sold at a profit, and the proceeds of one of these sales were applied on the purchase price of another property. In that year the taxpayer wife sold at a profit another piece of property which she had acquired in 1939. (R. 29–30.)

By the end of 1943 taxpayers had left four of the income producing properties and the eight unimproved lots received on liquidation of Oxford Associates, the other properties having been sold. (R. 31.)

In their 1943 income tax returns, taxpayers reported as long-term capital gains the profits from the sales of the following properties (R. 30):

	Date Acquired [1]	Date Sold	Sale Price	Cost Price
1248 S. LaJolla	1/ 1/42	5/12/43	$17, 109. 66	$13, 500. 00
2646 Vineyard	1/ 1/42	6/16/43	13, 250. 00	10, 500. 00
900 Kenmore	12/26/41	6/ 9/43	44, 000. 00	32, 022. 91
6282 Commodore Sloat Dr	8/29/42	6/11/43	23, 900. 00	19, 715. 52
341 N. Croft	1/ 1/42	6/ 5/43	9, 524. 37	7, 026. 93
1144 S. Hi-Point	1/ 1/42	9/16/43	7, 499. 96	5, 500. 00
2203 Beechwood	3/24/43	10/13/43	57, 500. 00	44, 500. 00
300 S. Clark	1/ 1/42	8/ 5/43	14, 000. 00	9, 520. 00

[1] The properties which are shown as being acquired by taxpayers on January 1, 1942, are the properties they received on liquidation of Oxford Associates. These properties were all acquired by that corporation between 1934 and 1941. (R. 29, 31.)

In addition taxpayers reported as short-term capital gains, the profits from sales of the following properties (R. 32):

Address	Date Acquired	Date Sold	Sale Price	Cost Price
626 W. 17th St	6/23/43	6/23/43	$17, 500. 00	$12, 750. 00
6439 S. Orange	6/ 1/43	7/ 8/43	27, 300. 00	24, 825. 51
424 Kings Rd	2/24/43	3/24/43	6, 450. 00	6, 006. 00
526 Harper	1/ 9/43	2/26/43	5, 900. 00	5, 049. 53
849 S. Holt	6/ 6/43	7/ 6/43	7, 000. 00	6, 357. 51
1208 Pointview	2/20/43	3/23/43	6, 900. 00	6, 751. 96
2031 Manning	10/ 1/43	11/ 1/43	5, 600. 00	4, 533. 10

From the sale of five of the above properties (LaJolla, Vineyard, Kenmore, Commodore Sloat, W. 17th) taxpayers realized about $44,000, which was applied as part of the price of another property (Cherokee) purchased for $176,000 in July, 1943, and still held by taxpayers. The monthly rentals from the five properties sold were about $1,900, while those from the larger property purchased was about $4,600. The proceeds of another property (N. Croft), sold in June of 1943, were used to purchase still another property (S. Orange) which taxpayers in turn resold the following month. The proceeds of two other properties sold in 1943 (Hi-Point and Beechwood) were

used to buy an interest in still another property (S. Gramercy). The proceeds of still another property sold in 1943 (S. Clark) were used to purchase another which produced about the same income. (R. 31–32.)

The net rental income derived by taxpayers during the calendar year 1943 was $16,958.08. (R. 32.) The profits realized from the sale of real estate in that year amounted to $50,894.64. (R. 35.)

In 1943 taxpayers handled no less than 25 separate transactions involving ten purchases and fifteen sales of rental properties. Seven of the ten properties purchased in 1943 were resold within two months of their purchase, all at a profit. From 1942 through 1944, taxpayers sold a total of 27 different real properties, all at a profit. In 1942 three properties were sold for $30,700, from which profits of $5,169.24 were realized. In 1943, fifteen properties were sold for $263,443.99, from which profits of $50,894.64 were realized. In 1944, nine properties were sold. The transactions were of sufficient frequency, continuity and substantiality to constitute the carrying on of a business. (R. 34–35.)

The properties sold by taxpayers during the taxable years were properties held primarily for sale to customers in the regular course of the business of buying and selling real estate for profit. (R. 32.)

In their income tax returns for 1943, taxpayers treated the $50,894.64 profits realized in that year from sales of real estate as capital gains, and reported only $29,815.84 as net capital gains. The Commissioner determined that the gains were taxable in full as

ordinary business income. (R. 13, 23, 32.) The Tax Court sustained the Commissioner's determination. (R. 33–37.)

SUMMARY OF ARGUMENT

The Tax Court properly sustained the Commissioner's determination that the profits by taxpayer's [2] sales of real estate during 1943 represented ordinary business income, not capital gain. It is settled that whether property is held primarily for sale in the ordinary course of business (and hence excluded from the definition of capital gains contained in Section 117 of the Internal Revenue Code) depends upon the frequency and continuity of the sales, and that this presents a question of ultimate fact. The Tax Court found that the properties in question were so held, and that finding is amply supported by the record. The number of properties bought and sold, the consideration received, and the profits realized show that the sales were not casual but frequent and continuous, and that taxpayers were engaged in the business of buying and selling real estate, for their own account. Further support for the Tax Court's conclusion is found in taxpayer's admission in his return for the taxable year that his business was that of "Realtor & Prop. Mgmnt.", and by his own testimony to the effect that he bought in order to resell and use the sales proceeds to purchase still bigger properties. There is no basis for disturbing the Tax Court's decision.

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[2] Since the taxpayers' business operations were conducted by the husband, he will be referred to throughout the argument as the taxpayer, although the wife's liability is also in issue because the taxpayers reported on a community basis.

ARGUMENT

The profits in question represented ordinary income, not capital gains

The sole question presented is whether the profits derived from taxpayer's sales of realty during the taxable year 1943[3] represented ordinary business income as determined by the Commissioner and held by the Tax Court, or capital gains, as contended by taxpayer. If ordinary income, they are taxable in full under Section 111 of the Internal Revenue Code (Appendix, *infra*). If capital gains, they are taxable only to the limited extent provided in Section 117 (b) of the Internal Revenue Code (Appendix, *infra*). The answer turns on whether the properties sold constituted "capital assets" as defined in Section 117 (a) of the Internal Revenue Code (Appendix, *infra*). That section defines capital assets as property held by the taxpayer, whether or not connected with his trade or business, but excludes *inter alia* "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In conjunction with the statutory provisions, Section 29.117-1 of Treasury Regulations 111 (Appendix, *infra*), provides that gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business "as in the case of a dealer in real estate" is not subject to the limitations of Section 117 (b), but is ordinary income.

[3] While the year is 1943, tax liability for the year 1942 is also involved because of Section 6 (the foregiveness feature) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

The test for determining whether property was "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" is now well established by numerous decisions of this Court and other Courts of Appeals. The primary test is the "frequency or continuity" of the sales. *Ehrman* v. *Commissioner,* 120 F. 2d 607, 610 (C. A. 9th), certiorari denied, 314 U. S. 668; *Richards* v. *Commissioner,* 81 F. 2d 369 (C. A. 9th); *Commissioner* v. *Boeing,* 106 F. 2d 305 (C. A. 9th), certiorari denied, 308 U. S. 619; *Welch* v. *Solomon,* 99 F. 2d 41 (C. A. 9th); *Snell* v. *Commissioner,* 97 F. 2d 891 (C. A. 5th); *Brown* v. *Commissioner,* 143 F. 2d 468 (C. A. 5th); *Greene* v. *Commissioner,* 141 F. 2d 645 (C. A. 5th), certiorari denied, 323 U. S. 717; *McFaddin* v. *Commissioner,* 148 F. 2d 570 (C. A. 5th); *Oliver* v. *Commissioner,* 138 F. 2d 910 (C. A. 4th); *Gruver* v. *Commissioner,* 142 F. 2d 363 (C. A. 4th); *Dunitz* v. *Commissioner,* 167 F. 2d 223 (C. A. 6th). Whether the sales are of sufficient frequency or continuity to constitute the carrying on of the "business" of selling presents a problem of ultimate fact. *Richards* v. *Commissioner, supra; Greene* v. *Commissioner, supra; White* v. *Commissioner,* 172 F. 2d 629 (C. A. 5th). The Commissioner's determination is presumptively correct, and the taxpayer thus has the burden of proving it wrong. *Commissioner* v. *Boeing, supra; Miller* v. *Commissioner,* 102 F. 2d 476, 480–481 (C. A. 9th). Accordingly, the Tax Court's finding should not be disturbed unless clearly erroneous. *Richards* v. *Commissioner, supra; Ehrman* v. *Commissioner, supra; Greene* v. *Commissioner, supra; Gruver* v. *Commis-*

sioner, supra; Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869.

The Commissioner determined (R. 13–14, 24, 32) that the profits realized from taxpayer's sales of realty in 1943, amounting to $50,894.64, were taxable in full as "business income" and not as a net capital gain of $29,239.73 as reported by the taxpayer. The Tax Court found that the real estate was held primarily for sale to customers in the ordinary course of taxpayer's business of buying and selling real estate for profit (R. 32), and sustained the Commissioner's determination. Applying the established "frequency or continuity" test, it concluded that taxpayer was engaged in the business of buying and selling real estate for his own account, in addition to being a real estate broker and investor in rental properties. (R. 33–34.) We submit that its conclusion is not only warranted but demanded by the record.

Taxpayer made ten purchases and fifteen sales in 1943, an average of one transaction every two weeks. (R. 34, 118, 140.) Each sale was made at a profit; the total consideration received amounted to $263,433.99 and the total profits amounted to $50,894.64. (R. 35, 68–69, 118, 140.) All of the seven properties sold in 1943, with respect to which taxpayer claimed short-term capital gains, had been purchased less than two months before their sale; one of them (626 W. 17th St.) was resold on the very day on which it was originally purchased. (R. 32, 68, 118.) As for the other eight properties sold in 1943, with respect to which taxpayer claimed long-term capital gains, one

(Beechwood) had been purchased six months before; another (Commodore Sloat) less than a year before; another (Kenmore) at the end of 1941; and the others were acquired at the beginning of 1942 upon liquidation of Oxford Associates. (R. 30, 69, 118.) In addition, taxpayer sold another nine properties in 1944, at a total profit of $33,163.24. (R. 35, 74.)[4]

As the Tax Court noted (R. 34–35):

> The record discloses that petitioners in 1943 handled no less than 25 separate transactions involving 10 purchases and 15 sales of rental properties. It is significant that 7 of the 10 properties purchased in 1943 were resold within two months after the date of purchase. Although petitioners offer various reasons to account for the sale of these properties, we regard such a rapid turnover of properties, all at a profit, as inconsistent with the concept of investing in real property for the purpose of securing rental income.
>
> In the calendar years 1942, 1943, and 1944 petitioners sold a total of 27 different real properties, all at a profit. Three properties were sold in 1942 for $30,700, from which net gains of $5,169.24 were realized. In 1943, they sold 15 parcels for $263,433.99, from which they derived net gains of $50,894.64. In contrast, petitioners reported net rental income of $11,287.58 and $16,958.08 for 1942 and 1943, respectively. In 1944 nine properties were sold.

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[4] Evidence of sales in years subsequent to the taxable year involved is relevant as showing that the sales in the taxable year were not isolated and involuntary but of sufficient frequency and continuity to constitute the carrying on of a business. *Ehrman v. Commissioner*, *supra*, p. 610.

These facts demonstrate that the transactions were of sufficient frequency, continuity and substantially to constitute the carrying on of a business.

Significantly, the taxpayer in his 1943 return reported his occupation to be that of "Realtor & Prop. Mgmnt." (R. 101.) This admission lends strong support to the Tax Court's conclusion that he was engaged in the business of buying and selling real estate for his own account. *White* v. *Commissioner, supra; Oliver* v. *Commissioner, supra.*

If more were needed to support the Tax Court's conclusion, it is provided by taxpayer's own explanation of why real estate was so frequently and continuously bought and sold for his own account. The taxpayer testified (R. 82–86) that he bought with a view to reselling and using the sale proceeds to acquire larger properties.[5]

[5] The taxpayer husband testified as follows (R. 82–83):

The Court: Mr. Field, as I understand, your objective has been to acquire a property with a large number of units.

The Witness: That is right.

The Court: And that was your objective a way back years ago, was it not?

The Witness: Yes, sir, back in——

The Court: And these smaller properties, as I understand it, you bought because they were the only ones that you had money to buy.

The Witness: To handle.

The Court: To handle. So wasn't it your idea that as you could get the larger unit that you were going to dispose of these properties and buy a larger unit with the money?

The Witness: That was the purpose of it.

The Court: That was the purpose. So these properties were bought, as I understand your testimony, with the idea of selling and acquiring money to buy a larger unit.

In this connection the Tax Court aptly observed (R. 35–36)—

> Petitioners explain that these properties were purchased and held by them for investment with the idea of later selling them to acquire larger properties which they regarded as better investments. Petitioners' reasons for purchasing the various properties in question are of little significance if the sales were so extensive as to establish them in the business of selling real estate on their own account. * * *
>
> Moreover, in view of the number of properties handled by the petitioners, this explanation actually indicates that they were in the business of buying and selling realty for a profit and using those profits to increase their investment in other rental property. * * * How a taxpayer may invest his profits would seem to have little bearing on the question of whether or not he is engaged in a trade or business.

The fact that taxpayer was a real estate broker (R. 28–29) does not prevent him from being also a dealer in real estate. A taxpayer may of course carry on more than one business (*Oliver* v. *Commissioner; Snell* v. *Commissioner,* both *supra*), particularly where, as here, we find the closely related ones of real estate broker and real estate dealer and the taxpayer repre-

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The Witness: That is right.

He further testified as follows (R. 86):

Q. Where did you expect to get the money to buy that larger apartment?

A. When the opportune time came to buy?

Q. Yes.

A. Then we would sell those equities to get it. That is what.

sents his business (R. 101) to be that of "Realtor." *White* v. *Commissioner, supra.* If the selling activities are frequent and continuous, involving substantial consideration and profits, they constitute in and of themselves the carrying on of a selling business; it is immaterial how much time the taxpayer devotes to such business, whether he conducts it personally or through agents, or whether he simultaneously works on other business. *Commissioner* v. *Boeing; Welch* v. *Solomon; Snell* v. *Commissioner; Greene* v. *Commissioner; Oliver* v. *Commissioner; White* v. *Commissioner,* all *supra; Fackler* v. *Commissioner,* 133 F. 2d 509 (C. A. 6th). True, as taxpayer asserts, he did not resell every piece of property acquired by him, but used a chosen few for rental income. The mere fact that taxpayer rented some properties does not preclude a finding that he was also engaged in the business of selling other rental properties. *Snell* v. *Commissioner; Greene* v. *Commissioner,* both *supra.* As the court stated in the *Snell* case (pp. 892–893):

> This taxpayer must, to defeat [sic] his claim to a capital gains rate, have been in the business of selling his lands. An occasional sale of land held as an investment is not such a business though profit results. The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation. It need not be one's sole occupation, nor take all his time. It may be only seasonal, and not active the year round. It ordinarily is implied that one's own attention and effort are involved, but the maxim qui facit per alium

> facit per se applies, and one may carry on a business through agents whom he supervises. The present taxpayer therefore does not demonstrate that he was not engaged in the business of selling lands because he also rented his buildings and operated a golf course; * * *.

Taxpayer's contention that the properties sold were held for investment, not for sale, is irreconcilable with the uncontradicted fact that (1) between 1942 and 1944 taxpayer sold no less than 27 properties, all at a profit; (2) during the taxable year 1943 alone, he sold 15 properties for $263,433, at a profit of over $50,000 as contrasted with a net rental income realized in that year of less than $17,000; (3) seven of 10 properties purchased in 1943 were sold within two months after the purchase of each, and the profits were reported as short-term capital gains (R. 32, 34–35, 68–69, 118); (4) eight of the 19 properties previously purchased through Oxford Associates were unimproved, non-income producing lots, and taxpayer still held them for profitable resale (R. 30–31, 49, 59–63);[6] (5) each of the nine properties sold in 1944 was an income-producing property (R. 74). Persons who buy property solely for investment do not waste their investment on non-income-producing lots, as a general rule; nor, if they buy income-producing property, do they subsequently resell it. Far from requiring the Tax Court to conclude as a matter of law that taxpayer purchased only for investment purposes, as taxpayer insists, these uncontradicted facts clearly warrant the

[6] Taxpayer testified that he still owns 12 of the 19 properties received upon liquidation of Oxford Associates (R. 49, 59), and that 8 of these are non-income-producing lots (R. 62–63).

conclusion that taxpayer was engaged in the business of buying and selling real estate, both improved and unimproved. Certainly it cannot be said that the Tax Court's conclusion on this score was clearly erroneous. Nor is there any merit in taxpayer's contention (Br. 16 *et seq.*) that his purpose in acquiring the properties was that of investment rather than resale. Aside from the fact that the record indicates the contrary, taxpayer's reasons or motives in originally acquiring the properties resold are no more material than the fact that some of the properties were rented pending their sale. If—as was the case here—resales are frequent and continuous, the Tax Court is fully justified in concluding that the property was "held" primarily for resale in the ordinary course of business and hence excluded from the definition of capital assets. As the Court said in the *Richards* case, *supra* (p. 373)—

> * * * we must assume that the intention of Congress as carried out was not to narrow this third class of property excluded, but was to include in the comprehensive word "held," property which might or might not have been purchased primarily for the purpose of resale.

Again, in the *Ehrman* case, *supra,* the Court stated (p. 610)—

> We fail to see that the reasons behind a person's entering into a business—whether it is to make money or whether it is to liquidate—should be determinative of the question of whether or not the gains resulting from sales are ordinary gains or capital gains. * * *

See also *Snell* v. *Commissioner, supra.*

Equally without substance is taxpayer's corollary contention (Br. 16–17, 24), that they cannot be deemed engaged in the business of buying and selling because the profits on the sales were used to buy rental properties. On the contrary, the fact that taxpayer used the profits from the sales to purchase other properties serves to confirm, rather than detract from, the correctness of the Tax Court's finding that he was as much engaged in the business of buying and selling real estate as he was in that of renting. Indeed taxpayer's profits from sales during the taxable year 1943 far exceeded net rental income. (R. 35.) As the Tax Court concluded (R. 35–36) "this explanation actually indicates that they were in the business of buying and selling realty for a profit and using those profits to increase their investments in other rental property."[7] At any rate, whether a taxpayer carries on a selling business obviously does not depend upon how he disposes of the profits of that business. Even if the properties had been acquired for investment and sold for liquidation purposes, that would not preclude a determination that taxpayer was engaged in the business of selling. *Ehrman* v. *Commissioner, supra; Brown* v. *Commissioner, supra. A fortiori,* such a determination is warranted where, as here, the taxpayer

[7] Taxpayer points (Br. 16) to the fact that he sold properties (at a profit of about $27,000) producing a rental of $1,900 and applied the proceeds toward the purchase of another property yielding a rental of $4,600. But while the rental income from the property purchased was over twice that of the property sold, the cost of the new property ($176,000) was about twice that paid for the old. (R. 30, 31, 32.) The proceeds of other rental property, all sold at a profit, were used to purchase property producing about the same rental. (R. 31–32.)

purchases numerous properties, resells them at a profit, and uses the sales proceeds to purchase other properties.

Taxpayer does not and cannot point to any authority which calls for reversal of the decision below. *Foran* v. *Commissioner,* 165 F. 2d 705 (C. A. 5th), upon which he relies (Br. 17), is not at all comparable and lends no support to his position. That case involved a single sale of oil producing properties, and as the court noted (p. 706), the Tax Court had made no finding that the taxpayer was engaged in the "business" of buying and selling. Nor did the record disclose any circumstance which in any way conflicted with the taxpayer's testimony that he had held the properties for investment, that he had never sold a producing oil property before, and had never offered the property for sale, and that he was forced by major oil companies to make the sale in question. The court agreed that the Tax Court was not bound to accept the taxpayer's explanation, if there were facts or circumstances indicating otherwise,[8] but held that in the absence of any such facts, the Tax Court erred in disregarding it.

[8] It is axiomatic that the trial judge is not required to accept uncontradicted testimony if there are any facts or circumstances which contradict it. *Quock Ting* v. *United States*, 140 U. S. 417, 420–421, 422; *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C. A. 4th). This rule applies even as to the taxpayer's testimony of intention. *Wilmington Co.* v. *Helvering*, 316 U. S. 164, 167; *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 295. The Tax Court is not bound to accept uncontroverted testimony "when there are facts which may even indirectly give rise to inferences contradicting the witness." *Cohen* v. *Commissioner*, 148 F. 2d 336, 337 (C. A. 2d).

No such situation is here presented, as already has been demonstrated. The undisputed facts show, and the Tax Court found, that taxpayer's buying and selling activities were so frequent and continuous as to amount to engaging in the "business" of buying and selling. Besides, the Tax Court did not disregard taxpayer's testimony; on the contrary, it accepted his explanation (R. 82–86) and properly concluded (R. 35–36) that "this explanation actually indicates that they were in the business of buying and selling realty for a profit and using those profits to increase their investments in other rental property." The Tax Court cases cited by taxpayer (Br. 19–21) are clearly distinguishable from the situation at bar.

Each case in this field necessarily turns on its own facts. If any comparison is to be drawn between this and other cases, then we submit that this case bears a closer resemblance to the cases cited, *supra,* in which the courts have sustained the Commissioner's and Tax Court's determinations that the gains represented ordinary income, than the ones cited by taxpayer.[9] Indeed, the evidentiary support for the Tax Court's decision here appears even stronger than in others in which its findings have been upheld by this Court. Cf. *Ehrman* v. *Commissioner, supra; Richards* v. *Commissioner, supra.* In so far as the conclusions of the Tax Court are based upon conflicting evidence, they are binding upon this Court unless they are clearly

[9] The decision of the Fifth Circuit in *Foran* v. *Commissioner, supra*, is to be contrasted, for example, with the decisions of the same court in *White* v. *Commissioner; Greene* v. *Commissioner; Brown* v. *Commissioner; Snell* v. *Commissioner; McFaddin* v. *Commissioner*, all *supra.*

erroneous. Internal Revenue Code, Section 1141 (a), as amended by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869; *Wright-Bernet, Inc.,* v. *Commissioner,* 172 F. 2d 343 (C. A. 6th); *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 393–396; *Tilghman* v. *Proctor,* 125 U. S. 136, 149; *Kimberly* v. *Arms,* 129 U. S. 512, 523–524; *Warren* v. *Keep,* 155 U. S. 265. Although this Court may draw a different inference from primary facts as found by the Tax Court, we submit that the ultimate finding of the Tax Court that taxpayer was engaged in buying and selling property held "primarily for sale to customers in the ordinary course of his trade or business" is the only inference that could have been drawn from the facts as found by the Tax Court.

CONCLUSION

In view of the foregoing, it is submitted that the Tax Court's decision is correct both in fact and law, and should be affirmed.

Respectfully submitted,

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DECEMBER, 1949.

APPENDIX

Internal Revenue Code:

Sec. 111. Determination of amount of, and recognition of, gain or loss.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

*   *   *   *   *

(26 U. S. C. 1946 ed., Sec. 111.)

Sec. 117. Capital gains and losses.

(a) *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *;

*   *   *   *   *

(b) [As amended by Sec. 150 (c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

*   *   *   *   *

(26 U. S. C. 1946 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.117-1. *Meaning of Terms.*—The term "capital assets" includes all classes of property not specifically excluded by section 117 (a) (1). In determining whether property is a "capital asset," the period for which held is immaterial.
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> * * * * *
>
> However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117 (b), (c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.
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